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LIABILITY FOR FIRE LOSS CAUSED BY INADEQUATE WATER SUPPLY

The question of a public utility's liability for injury caused by an inadequate water supply to combat fire has again been given a negative answer in a recent New Jersey case.¹ A review of the authorities on this subject seems desirable.

LIABILITY OF MUNICIPAL CORPORATION OPERATING A WATER COMPANY

Unless a right of action is given by statute, it is well established that municipal corporations may not be held liable to individuals for neglect to perform, or negligence in performing, duties which are governmental in their nature, including generally all duties existent or imposed upon them by law solely for the public benefit.² The rationale for this exemption is that the municipality acts in its sovereign capacity in performing governmental functions as a public agent either of the state or of the local community, and public policy dictates public funds and public property be protected.³

The rule is otherwise where the municipality acts in its proprietary capacity. There is substantial unanimity upon the proposition that the incorporated city or town is liable for negligence to the same extent as a private corporation or individual when it exercises its private or corporate powers.⁴

Where the injury is the result of active wrongdoing, there is some authority indicating this is an exception to the rule of municipal non-liability for torts committed in a governmental capacity.⁵ Other cases make no distinction between intentional and negligent wrongful acts, applying the rule of non-liability to both.⁶

The municipality functions in its corporate or proprietary capacity in the operation and maintenance of public utilities. Consequently municipal ownership of a public utility must of necessity carry with it the same duty, responsibility and liability for negligence that is imposed upon private owners of similar enterprises. This rule has been fre-

¹ *Reimann v. Monmouth Consolidated Water Co.*, 9 N.J. 134, 87 A. 2d 325 (1952).

² 18 McQUILLAN, MUNICIPAL CORPORATIONS §53.24 (3rd ed. 1950).

³ Although the doctrine of municipal non-liability in the performance of governmental acts is at present prevailing, it is undergoing modification. In this regard see 8 VA. L. REV. 22 (1936); *Barker v. City of Sante Fe*, 47 N.M. 85, 136 P. 2d 480 (1943).

⁴ *Bolster v. Lawrence*, 225 Mass. 387, 114 N.E. 722 (1917); *Henry v. Lincoln*, 93 Neb. 331, 140 N.W. 664 (1913); *Chadwick v. City of Crawfordsville*, 216 Ind. 399, 24 N.E. 2d 937 (1940); *supra*, note 2.

⁵ *Callan v. Passiac*, 104 N.J. L. 643, 141 Atl. 778 (1928); *Adams v. City of Toledo*, 163 Ore. 185, 96 P. 2d 1078 (1939).

⁶ *Johnson v. City of Somerville*, 195 Mass. 370, 81 N.E. 268 (1907); *Cleveland Wrecking Co. v. Struck Coast Co.*, 41 F. Supp. 70 (W.D. Ky., 1941).

quently applied with respect to municipal light and power plants, gas-works and waterworks.⁷

However a municipality operating a waterworks pursues this activity in a dual capacity. A city undertaking the sale of water for private consumption is generally held to be engaged in a commercial venture, and for negligence therewith is liable as a private corporation would be.⁸ But insofar as the municipality undertakes to supply water to extinguish fires, or for some other public purpose, it acts in a governmental capacity and cannot be held liable for negligence.⁹

On the theory that the municipality acts solely in a corporate capacity in supplying water, a few cases hold the municipality liable,¹⁰ but the majority apply the theory of dual capacity, and thus under the prevailing view the municipality is not liable for any negligence connected with supplying water for fire extinguishment purposes.

LIABILITY OF WATER COMPANIES

Under the majority rule a public utility is not liable for a loss caused by an inadequate water supply. Unless there is a direct contractual relation between the private owner and the water company relative to the furnishing of adequate water for fire protection, the rule followed in the great majority of jurisdictions is that a private owner or his insurer cannot maintain an action against the water company.¹¹

These authorities deny the right of a private citizen to bring either an action *ex contractu* on the contract between the municipality and the water company or *ex delicto* for alleged negligence in the failure of the company to perform its contract.

MAJORITY VIEW DENYING RECOVERY EX CONTRACTU

The individual inhabitant's recovery on the contract has been denied on various grounds. One is the lack of privity between the individual citizen and the water company when the company's contract is with the municipality. Privity, it is said, cannot be introduced into such contracts by reason of taxpaying.¹² Nor does privity exist even though the

⁷ *Seitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704 (1945); *Lyons v. City of Lowell*, 239 Mass. 310, 131 N.E. 860 (1921).

⁸ *U.S. v. City of Minnesota*, 68 F. Supp. 585 (Minn. 1946); *Badten v. City of Stevens Point*, 209 Wis. 379, 245 N.W. 130 (1932).

⁹ *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N. Y. 160, 159 N.E. 896 (1928); *Nashville Trust Co. v. City of Nashville*, 182 Tenn. 545, 188 S.W. 2d 342 (1945).

¹⁰ *Sullivan v. Inhab. of Town of Saugus*, 305 Mass. 127, 25 N.E. 2d 185 (1940).

¹¹ *German Alliance Insurance Company v. Home Water Supply Co.*, 226 U.S. 220 (1912); *H. R. Moch Co. v. Rensselaer Water Co.*, *supra* note 9; *Prindle v. Sharon Water Co.*, 105 Conn. 151, 134 Atl. 807 (1926); *Concordia Fire Ins. Co. v. Simmons Co.*, 167 Wis. 541, 168 N.W. 199 (1918); 67 C. J. WATERS §841b.

¹² *Hone v. Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769 (1908); *Allen v. Shreveport Water Co.*, 113 La. 1091, 37 So. 980 (1905).

municipality has levied a special tax to pay the water company for a sufficient supply of water for fire use.¹³

In a Nevada case,¹⁴ the plaintiff claimed the interest, for taxing purposes, of the municipality in property destroyed by fire (loss of tax money through burned property) gave it a right of action assignable to the property owner. The court denied this contention.

Many cases embodying the doctrine of non-liability of the water company where the contract is with the municipality consider the individual property owner a stranger to the agreement.¹⁵

A right of action cannot be predicated in favor of the inhabitants upon the theory the agreement with the company was made for their benefit.¹⁶ The benefit to be conferred upon individual citizens is incidental to the contract; the primary object is the benefit of all the citizens in their corporate capacity.

Britton v. Green Bay Water Co.,¹⁷ basing its decision on the above reasoning, asked:

"Must one, when entering a contract with another, look to see who else might possibly in some way be remotely interested and injured by its breach? There would be no end to such a liability."

Divergent views with respect to whether an individual property owner is beneficiary of the agreement, in such a sense as to enable him to maintain an action upon it, reflect differences of judicial opinion in regard to a broader question, viz., how far it is proper, with reference either to general principles of law or statutory provisions regulating procedure, to carry relaxation of the rule which precludes a stranger to the contract from suing on it.

Several water company cases expressly rely on *Vrooman v. Turner*.¹⁸ Under the criterion of beneficial interest defined in that case, an individual owner of property is not entitled to sue the water company on the mere ground that he, in common with all other residents, derives indirect or incidental benefit from the municipality's contract with it.

Some courts base non-liability on the absence of a municipal duty to supply inhabitants with ways and means of extinguishing fires; consequently the case of injury to individuals by failure of a water

¹³ *Becker v. Keokuk Waterworks*, 79 Iowa 419, 44 N.W. 694 (1890); *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S.W. 784 (1893).

¹⁴ *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485 (1881).

¹⁵ *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1 (1878).

¹⁶ *Eaton v. Fairbury Waterworks*, 37 Neb. 546, 56 N.W. 201 (1893); *Lovejoy v. Bessemer Water Co.*, 146 Ala. 374, 41 So. 76 (1906); *Hone v. Presque Isle Water Co.*, *supra*, note 12.

¹⁷ *Britton v. Green Bay & Fort H. Waterworks Co.*, 81 Wis. 48, 51 N.W. 84 (1892).

¹⁸ *Vrooman v. Turner*, 69 N.Y. 280 (1879); *Howsmon v. Trenton Water Co.*, *supra*, note 13; *Peck v. Sterling Water Co.*, 118 Ill. App. 533 (1905).

company to perform its contract with the city does not come within the rule which permits suit by one not a party to the contract, where the promisee owes a duty to such party which the promisor undertakes to perform.¹⁹

Recovery has been denied on the premise that liability for damages for negligence in the performance of the company's duty can not be imposed beyond that contemplated by the contract. Such cases predicate non-liability on the absence of intent on the part of water companies to assume a responsibility so burdensome as that of indemnifying individual inhabitants. This is indicated by the smallness of the remuneration.²⁰ However, it would seem the intent of the contracting parties should be a question of fact, depending on the circumstances of each case.

Defect of power is another theory. A law which authorizes the city to contract with individuals and companies for the building and operation of waterworks confers no power on the city to make a contract of indemnity for the individual benefit of citizens or residents for breach of which a property owner could maintain an action in his own name.²¹ This theory has been approved in only a few cases and is inconsistent in a state which recognizes the right of individual property owners to sue the company for its failure to supply wholesome water.

Some cases maintain the water company acts as an agent of the municipality with which it contracts, and consequently is entitled to claim the same immunity as that which is conceded to the municipality with regard to claims founded on injuries resulting from fires.²² However, there are several objections to this theory. Since the water company is an independent contractor, it is not in any proper sense an agent of the municipality. Also the immunity given to contractors does not extend to positive negligence on their part.

Others hold the municipal corporation does not act as an agent of the individual inhabitant.²³ The municipality and inhabitants are distinct separate persons and the corporation is not the mandatory of

¹⁹ *Howsmon v. Trenton Water Co.*, *supra*, note 13.

²⁰ *Ancrum v. Camden Water Co.*, 82 S.C. 284, 64 S.E. 151 (1909); *Niehaus Bros. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375 (1911). Damages must be such as were in the contemplation of parties and for such meager remuneration it cannot be claimed the water company would take on the risk of making good a loss from destruction of a modern city by fire. 1 FARNAM, WATER AND WATER RIGHTS 158c (1904).

²¹ *Becker v. Keokuk Water Co.*, *supra*, note 13; *Mott v. Cherryvale Water and Mfg. Co.*, 48 Kan. 12, 28 Pac. 989 (1892).

²² *Peck v. Sterling Water Co.*, *supra*, note 18; *Howsmon v. Trenton Water Co.*, *supra*, note 13; *Akron Water Co. v. Brownless*, 10 Ohio Cir. Ct. 620 (1894).

²³ *Allen v. Shreveport*, *supra*, note 12; *Greenville Water Co. v. Beckham*, 55 Tex. Civ. App. 87, 118 S.W. 889 (1909). Void because beyond the power of municipality to make. Individuals have tried to evade the lack of privity argument by claiming the city acted as an agent.

the inhabitants for entering into contracts for them individually. One cannot even be a substantial agent without authority to bind the principal to something and the city has no authority to bind individual inhabitants to a water contract. Also the doctrine that the municipality is an agent involves a corollary, manifestly unsound, that the water company is entitled to maintain an action against an inhabitant if the agreement is not fulfilled by the municipality.

In *Wainwright v. Queens County Water Co.*,²⁴ the court asserts lack of causation as a reason for denying liability.

"In most cases it would be impossible to say that failure to furnish water was the cause of loss. With all the uncertainty which exists as to what is the particular cause responsible for fire loss, the water company cannot be held liable unless it assumes the responsibility of insurer. Mere breach of contract to furnish water to extinguish fire cannot be said to be the cause of loss, because such cause may have been the negligence of owner, the criminal act of a stranger, atmospheric conditions, or any one of numerous other things."

A Texas case also decided non-liability might be deduced from the consideration that the water company's failure to supply water at the time claimant's property was damaged by fire was not the proximate cause of the damage.²⁵

However, this should not be the basis for a general rule since causation ought to be a question of fact for the jury. Other courts have held that such injury might reasonably be anticipated. The consequences of the breach are natural and can readily be anticipated.²⁶

Public policy is often stated to be a reason for not holding the water company liable. Many courts feel an excessive burden would be imposed upon water companies if they were responsible for damage to individuals by fire. In *Hone v. Presque Isle Water Company*,²⁷ a leading case on this subject, the court said:

"Otherwise water companies would be required to assume the responsibility of insurers, and it does not appear such a doctrine would be more consonant with reason and justice than the established rule. Ample opportunities are afforded all property owners to obtain insurance against losses by fire, and assumption of such risks by water companies would result in double insurance and largely increase water rates. Furthermore, capital would not readily seek investments in enterprises involving a public service exposed to incalculable hazards and constant litigation. In the practical administration of the law, the established rule hasn't been found the cause of extraordinary hardships or the occasion for exceptional complaints."

²⁴ 78 Hun. 146, 28 N.Y. Supp. 987 (1894).

²⁵ *House v. Houston Waterworks*, 88 Tex. 233, 31 S.W. 179 (1895).

²⁶ *Milford v. Bangor*, 104 Me. 248, 71 Atl. 759 (1908).

²⁷ *Hone v. Presque Isle Water Co.*, *supra*, note 12.

It may be doubted whether the possibility of a company being occasionally called upon to satisfy the claims of individuals would exercise such a serious influence on prospective investors. Claims of this type constitute a portion of outlay incidental to enterprises of all kinds. And the liability they would incur would be only in those cases where actual negligence was proved. Therefore, it is difficult to see that the ordinary risks are so great as to warrant the court in treating them as an element affecting the question of public policy. The same reasoning might be applied to any other corporate enterprise.²⁸

MINORITY VIEW ALLOWING RECOVERY EX CONTRACTU

Three states affirm the right of the individual inhabitant of a municipality to maintain an action ex contractu against the water company for failure to provide an adequate water supply to extinguish fires. They are Florida, Kentucky and North Carolina. The basis for many of these decisions is that agreements between the water company and municipality for supply of water for fire extinguishment are made for the benefit of every inhabitant of the municipality.²⁹

In one of the leading cases supporting this doctrine, *Paducah Lumber Company v. Paducah Water Supply Company*,³⁰ it was said:

"If there be, in fact, consideration for the promise made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued."

Other cases upholding the doctrine have stated that where one person makes a promise for the benefit of a third person, that person may maintain an action on such promise.³¹ A few cases hold that even under the English rule a third person cannot sue upon a promise made for his benefit where he is a stranger both to the promise and to the consideration; the inhabitant would come within it since the inhabitant by his taxes contributes to the consideration and has an interest in its performance.

Liability is also predicated on the theory that individual citizens are, with respect to contracts of this type, "real parties in interest" in the sense in which the phrase is used in modern codes of procedure.³²

²⁸ 7 THOMPSON ON CORPORATIONS §5528 (3rd ed. 1927).

²⁹ *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 249, 49 So. 556 (1909); *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S.W. 554, 13 S.W. 249 (1889); *Kentucky Utilities Co. v. Farmers' Co-op.*, 246 Ky. 40, 54 S.W. 2d 364 (1932).

³⁰ *Supra*, note 29.

³¹ *Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 328, 325 S.E. 720 (1899); *Planters Oil Mill v. Monroe Water and Light Co.*, 52 La. Ann. 1243 (1900), later overruled in Louisiana, however by *Allen v. Shreveport*, *supra*, note 12; *Ancrum v. Camden Water Co.*, *supra*, note 20.

³² *Woodbury v. Tampa Water Works Co.*, *supra*, note 29; *Paducah Lumber Co. v. Paducah Water Supply Co.*, *supra*, note 29.

The agency theory, discussed above, is another possibility. Several cases have held that officials who execute the contract are technically agents of the municipality which is itself an agent of the people, who are thus effectively principals of the contract.³³

MAJORITY VIEW DENYING RECOVERY EX DELICTO

The inability of a citizen to maintain an action in tort against the water company for damage resulting from the negligence of the water company in not furnishing sufficient water or water pressure for fire-protection purposes as required by a contract between the water company and municipality has been referred to various considerations.

The contract of a water company with the municipality to furnish a supply of water for fire purposes does not impose upon the water company a public duty, breach of which will render it liable in tort for loss of property by an inhabitant or taxpayer of the city.³⁴

An individual cannot sue in tort, because, in absence of a contract obligation to him, the water company owes him no duty for breach of which he can maintain an action.³⁵ Mere breach, by omission only, of a contract entered with the public is not a tort, direct or indirect, to a private property owner.³⁶

The circumstances incidental to performance of the undertaking of the water company are not of such nature as to warrant application of the general doctrine of tort liability where under certain facts, and as a result of entering upon the execution of a contract, a person may subject himself to liability to parties other than the contractee.³⁷

The undertaking of a water company does not come within the scope of the rule that one who engages in construction of public work is liable for injury inflicted upon a third person by reason of negligence in respect to performance of the contract.³⁸ However, the court does not suggest any definite ground upon which contracts of the type referred to are to be differentiated from those made by water companies.

An agreement providing for supply of water does not operate so as to subject the contractor to a public duty.³⁹ The *Hone* case quoted above gives some of the reasons for this holding.

And finally, the water company does not perform the function of a public officer, so as to be liable for its negligence causing private

³³ *Fisher v. Greensboro Water Supply Co.*, 128 N.C. 375, 38 S.E. 912 (1901).

³⁴ *German Alliance Ins. Co. v. Home Water Supply Co.*, *supra*, note 11; *Hone v. Presque Isle Water Co.*, *supra*, note 12.

³⁵ *Davidson v. Nichols*, 11 Allen (Mass.) 514 (1866).

³⁶ *Freeman v. Macon Gas, Light and Water Co.*, 126 Ga. 843, 56 S.E. 61 (1906); *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, 9 S.E. 673 (1889).

³⁷ *Britton v. Green Bay Water Co.*, *supra*, note 17.

³⁸ *Ibid.*

³⁹ *Baum v. Somerville Water Co.*, 84 N.J.L. 611, 87 Atl. 140 (1913).

damage.⁴⁰ Wisconsin follows the majority rule, and will not let the individual recover in a tort action.

MINORITY VIEW ALLOWING RECOVERY EX DELICTO

The individual's right of action against the water company in a tort action has been affirmed on two distinct grounds:

1. The circumstances are within the scope of the general doctrine that an individual may be under no obligation to do a particular thing and his failure to act creates no liability, but if he voluntarily attempts to act and to do a particular thing, he comes under an implied obligation in respect to the manner in which he does it. This obligation is to use reasonable care. And if through negligence injury results to an individual the company will be liable in tort.⁴¹

2. The effect of the company's acceptance of its franchise is to impose upon it a public duty in respect to supplying water for the purposes stipulated.⁴² Failure to perform a contract duty may not be tort; but if a legal duty is imposed independent of or concurrent with the contract, breach of the legal duty may be a tort.⁴³

STATUTES IMPOSING SPECIFIC DUTIES OR LIABILITIES

An individual inhabitant is entitled to sue a water company in tort if it appears that the result of its having entered into a contract with the municipality was to subject the company to a specific statutory duty with regard to the inhabitants of the municipality.⁴⁴

However decisions are conflicting with regard to whether remedial rights of inhabitants are enlarged by an enactment which in general terms imposes upon all public service companies a liability for damage caused by infringement of its charter provisions.

In most cases the fact that a statute or ordinance defines the obligation of the water company with respect to the supply, (imposing upon it, for example, the duty of furnishing water for fire extinguishment purposes) is not considered as rendering the company liable for loss of private property through negligent failure of water supply.⁴⁵

Krom v. Antigo Gas Company held that a statute which provided for liability of public utilities to treble damages created no new liability except to treble the amount of damages, and did not render the water company liable to a private citizen for its failure to supply water for

⁴⁰ *Wainwright v. Queens County*, *supra*, note 24; *Britton v. Green Bay Water Co.*, *supra*, note 17.

⁴¹ *Guardian Trust & Deposit Co. v. Fisher*, 200 U.S. 57, 68 (1906).

⁴² *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 So. 81 (1906); *Fisher v. Greensboro Water Supply Co.*, *supra*, note 33; *supra*, note 41.

⁴³ *Woodbury v. Tampa Waterworks Co.*, *supra*, note 32.

⁴⁴ *Freeman v. Macon Gas, Light and Water Co.*, *supra*, note 36.

⁴⁵ *Eaton v. Fairbury Waterworks*, *supra*, note 16; *H. R. Moch Co. v. Rensselaer Water Co.*, *supra*, note 9; *Britton v. Green Bay Water Co.*, *supra*, note 17.

extinguishment of fires under its contract with the city whether its failure was willful or merely negligent.⁴⁶ The fact that the company acts in pursuance of an ordinance does not enlarge remedial rights of claimants. Some cases hold to the contrary.⁴⁷

ANALYSIS

The cases in which the inhabitant is precluded from suing *ex contractu* are a decisive preponderance. Many states have followed the majority rule merely because it is the numerical majority. However, as stated in *Gorrell v. Greensboro*⁴⁸ and in the dissent in the New Jersey case which occasioned this comment,⁴⁹ "Decisions are to be weighed not counted." It is not probable that the rule will be changed to allow an inhabitant to sue on the contract. But in *Pond v. New Rochelle*,⁵⁰ a New York Court of Appeals held that an individual was entitled to maintain an action to restrain defendant company from exacting higher water rates than that fixed by agreement with the municipality. The objection that complainant was a stranger to the agreement was pronounced untenable. It is possible that a similar objection will be overruled in a fire loss case, so there is some slight reason to think the rule may yet undergo change.

Professor Corbin suggests that since under the guise of implied contracts, courts have enforced numberless duties where there is no privity of contract, this should not be a bar to an action by the individual against the water company.⁵¹ Decisions in jurisdictions which do not recognize the rights of any beneficiary should not be authority in states that have abandoned the requirement of privity. As to whether the citizen is a beneficiary of such a contract, Corbin asks, "How can the community be benefited except through the individuals that compose that community?"⁵² A hollow benefit is conferred by a contract for breach of which no one can collect damages. The city cannot recover for it has no pecuniary interest. The community at large cannot for it is too indefinite and the individual cannot for the contract is not for his benefit.⁵³

He further states that the property owners are in fact the sole beneficiaries of the water company's promise, and sole beneficiaries

⁴⁶ *Krom v. Antigo Gas Co.*, 154 Wis. 528, 140 N.W. 41 (1913).

⁴⁷ *Trustees of Jennie De Pauw Memorial Church v. New Albany Waterworks Co.*, 130 N.E. 827 (Ind. App. 1921).

⁴⁸ *Gorrell v. Greensboro Water Supply Co.*, *supra*, note 31.

⁴⁹ *Supra*, note 1.

⁵⁰ 183 N.Y. 330, 76 N.E. 211 (1906).

⁵¹ Corbin, *Liability of Water Cos. for Losses by Fire*, 19 YALE L. J. 425 (1910).

⁵² One case goes to the extreme of holding that even the town has no right of action for damages to municipal property. That is, the town as a corporation as well as the town of individuals must be content with those ephemeral benefits to be derived by everybody but nobody. *Town of Ukiah v. Ukiah Water Co.*, 142 Cal. 173, 75 Pac. 773 (1904).

⁵³ *Supra* note 51.

should be given a right of action as they actually have been given in many jurisdictions, including Wisconsin. In such jurisdictions it is inconsistent to deny a remedy against the water company.

The preponderance of authority is also adverse to the right of the individual inhabitant to sue *ex delicto*, but it is not so clearly decisive as with respect to actions on the contract. It is certainly arguable that the water company assumes a public duty. The company is the grantee of public franchises, to which corresponding duties are affixed.⁵⁴ It has been held that the customer may recover damages on this ground if the company cuts off the water supply.⁵⁵ This theory derives strong support from analogy to cases in which parties contracting with the state or with the municipality have been held liable to third persons for injury resulting from their negligence in allowing the subject matter of their contracts to be in an abnormally dangerous condition. And it is in harmony with cases in which it has been held that the individual inhabitant may by mandamus compel the water company to furnish water.⁵⁶ Where the action is on the contract, the financial burden may have some significance in determining intent, but it is irrelevant where the claim is based on tort.

Many states have not as yet discussed or decided liability in tort in this type of case. The United States Supreme Court has shown it is willing to follow North Carolina in holding failure of water company may be tort. In the *Guardian Trust* case, the court said:

"The company invites citizens and if they avail themselves of its conveniences and omit making other arrangements for the supply of water, then the company owes a duty in discharge of its public calling, and neglect by it in the discharge of obligation imposed by its charter or contract with the city may be regarded as a breach of an absolute duty and recovery may be had for such neglect. Action, however, is not for breach of contract, but for negligence in discharge of such duty to public and is an action for tort."⁵⁷

Such tort liability can be supported by analogy. Water companies are public service corporations. They have a necessary monopoly, are given valuable privileges and must be subject to public control. In the past, courts have imposed special duties on persons engaged in public service, as for example, common carriers and innkeepers. A water company owes a duty to all the inhabitants from whom its privileges

⁵⁴ *Freeman v. Macon Gas, Light and Water Co.*, *supra*, note 36.

⁵⁵ *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264 (1885); *Haugen v. Albina Light and Water Co.*, 21 Ore. 411, 28 Pac. 244 (1891).

⁵⁶ *McCrary v. Beaudry*, *supra*, note 55; *Portland Nat. Gas & Co. v. State*, 135 Ind. 54, 34 N.E. 818 (1893); *Robbins v. Bangor R. & Co.*, 100 Me. 496, 62 Atl. 136 (1905).

⁵⁷ *Supra*, note 41. With respect to the Supreme Court, the authority of this case has been destroyed by comments made upon it in the *German Alliance Case*, *supra*, note 11; nevertheless the reasoning is still worthy of consideration.

and compensation are derived, who rely on it for public service as it knows, and whom it has undertaken to serve.

The public policy argument against liability is weakened by the survival of water companies in the states which impose liability. The minority rule merely compels the water company to perform its contract. In the absence of such a rule, it can break its contract with impunity and can fail to render its public service without liability.

The New Jersey case based the water company's non-liability on the fact that such non-liability has stood for 40 years and rates of water companies have been established and approved on that basis; therefore any change would have to be by legislation. The court also found the public policy argument convincing.

"Individuals can protect themselves by insurance. Premiums vary, but water rates do not. If liability, then there would be no predetermined limit of such liability. It might bankrupt the small companies. There would be much litigation and confusion. The majority view of the country agrees with this non-liability."

A very detailed dissent in that case points out that a public utility affects public interest and enjoys extensive privileges. In return for those privileges, it is reasonable to conclude that the water company assumes a concomitant duty to the public it serves. So it follows that for failure to perform that duty with reasonable care, it subjects itself to liability to those injured. The dissent also notes that actionable negligence today is frequently predicated on a duty of care which arises out of an implied representation which induces reliance. And the public and customers have relied on the holding out of the company that it will maintain water pressure. It dispels the public policy argument by reasoning that the water company can insure itself against its own negligence as well as can the property owners. Justice requires the burden of loss on insurance therefore should fall on the party at fault. If the rates are too low to cover the cost, they can be adjusted.

Under general tort principles, the company should be liable. The modern tendency is to impose strict liability on those in control of a situation which, if things go wrong, may result in a holocaust. One explanation of the majority rule is that the earlier cases were decided at a time when nonfeasance and lack of privity were sufficient to prevent liability and the subsequent cases have followed these precedents.⁵⁸

A person has a duty to protect from harm others who, because of a relation into which he has voluntarily entered, are dependent on him. Similar duties may be created by agreement, as where one person has contracted to protect another. In such cases, liability exists only if the assumption of duty has resulted in reliance and if harm has resulted

⁵⁸ *Principles of Torts*, 56 HARV. L. REV. 72 (1942).

from the combination of promise, reliance and failure to perform. Because of this a gratuitous promise, if reasonably relied on, would be as effective a basis for tort liability as would a contractual obligation. It should be noted that on the same theory, where one promises to protect a third person, the third person may have tort claims against the promisor if failure to perform results in harm.⁵⁹

CONCLUSION

It is the author's opinion that the minority view is the better one. Although under the contract theory, the arguments pro and con seem fairly equal, there appears to be no real reason an individual should not be able to maintain an action as one for whose benefit the contract was intended. On the tort theory, the arguments for liability are clearly convincing. As stated above, water companies as public utilities receive valuable privileges, they should be required to assume corresponding duties. And the holding out of the water company plus reliance thereon by the individual property owner is sufficient basis for tort liability. Perhaps if the states which have not as yet decided the question of tort liability "weigh the decisions, rather than count them," the minority will become a majority.

JANICE M. MANNIX

⁵⁹ *Ibid.*